(9)

Supreme Court, U.S.
FILED
JUN 6 - 2011
OFFICE OF THE CLERK

No. 09-1254

IN THE

Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA and NORTON SIMON ART FOUNDATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

E. RANDOL SCHOENBERG
DONALD S. BURRIS
LAURA G. BRYS
BURRIS, SCHOENBERG
& WALDEN, LLP
12121 Wilshire Boulevard
Suite 800
Los Angeles, CA 90025-1168
(310) 442-5559

LAWRENCE M. KAYE
Counsel of Record
DARLENE FAIRMAN
HOWARD N. SPIEGLER
FRANK K. LORD IV
HERRICK, FEINSTEIN LLP
2 Park Avenue
New York, NY 10016
(212) 592-1400
lkaye@herrick.com

Attorneys for Petitioner

235424

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES	ii
THE PETITION SHOULD BE GRANTED	1
CONCLUSION	12

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

American Ins. Ass'n v. Garamendi,
539 U.S. 396 (2003) ..... *passim*

In re Assicurazioni Generali, S.p.A.,
592 F.3d 113 (2d Cir. 2010) 2

Chamber of Commerce of the U.S. v. Whiting,
No. 09-115, slip op. (U.S. May 26, 2011) 1, 4

Dunbar v. Seger-Thomschitz,
615 F.3d 574 (5th Cir. 2010) 2

Grosz v. Museum of Modern Art,
403 Fed. Appx. 575 (2d Cir. 2010) 2

Medellín v. Texas,
552 U.S. 491 (2008) 1, 5

Movsesian v. Victoria Versicherung AG,
629 F.3d 901 (9th Cir. 2010) 10, 11

Museum of Fine Arts v. Seger-Thomschitz,
623 F.3d 1 (1st Cir. 2010) 2

Saleh v. Titan Corp.,
580 F.3d 1 (D.C. Cir. 2010) 2

United States v. Portrait of Wally,
663 F. Supp. 2d 232 (S.D.N.Y. 2009) 8

Cited Authorities

Page

Zschernig v. Miller,
389 U.S. 429 (1968) 1, 2

STATE CASES

Deuley v. Dyncorp Int'l, Inc.,
8 A.3d 1156 (Del. 2010) 2

STATUES

Cal. Code of Civ. Proc. § 354.3 (2011) 3, 4

OTHER AUTHORITIES

B. Denning & M. Ramsey, American Ins. Assoc. v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 Wm. & Mary L. Rev. 825 (2004) 2-3

Stuart E. Eizenstat, *Imperfect Justice* (2003)..... 8

Stuart E. Eizenstat, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference*, Prague Conference on Holocaust Era Assets, Czech Republic (June 28, 2009), http://www.state.gov/p/eur/rls/rm/2009/126158.htm 9

Cited Authorities

Page

J. Christian Kennedy, Special Envoy for Holocaust Issues, *The Role of the United States Government in Art Restitution*, Conference in Potsdam Germany (Apr. 23, 2007), http://germany.usembassy.gov/kennedy_speech.html 8, 9

J. Kreder, *State Law Holocaust-Era Art Claims and Federal Executive Power*, 105 Nw. U. L. Rev. Colloquy 315 (2011), http://colloquy.law.northwestern.edu/main/2011/05/state-law-holocaust-era-art-claims-and-federal-executive-power.html 2

Proceedings of the Washington Conference on Holocaust-Era Assets (J.D. Bindenagel ed. 1999), *available at* http://www.state.gov/www/regions/eur/holocaust/heac.html 8, 10

C. Pytynia, Note, *Forgive Me, Founding Fathers For I Have Sinned: A Reconciliation Of Foreign Affairs Preemption After* Medellín v. Texas, 43 Vand. J. Transnat'l L. 1413 (2010) 3

Recommendations for the Restitution of Works of Art, Ekkart Committee (Apr. 2001), http://www.herkomstgezocht.nl/download/aanbevelingen2en.doc 7

Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259 (2009) 1

Cited Authorities

Page

M. Schaefer, *Constraints on State-Level Foreign Policy· (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 Seton Hall L. Rev. 201 (2001) 3

Terezin Declaration (June 30, 2009), http://www.state.gov/p/eur/rls/or/126162.htm 8, 9

Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/122038.htm 8, 9

THE PETITION SHOULD BE GRANTED

Like the Respondents, the Acting Solicitor General ("Solicitor General") does not address the real issue before the Court: the need to clarify its decisions in *Zschernig v. Miller*, 389 U.S. 429 (1968) and *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) in light of numerous inconsistent interpretations of those decisions. And it is easy to see why.

The Solicitor General finds great benefit in *his* interpretation of the *Garamendi* decision -- attributing greater power to the Federal Government than ever before by arguing that the states' ability to act on any issue that might remotely touch on foreign affairs is preempted. Thus, the Solicitor General is desperate to dissuade this Court from reexamining the foreign affairs field preemption/dormant foreign affairs doctrine, and especially *Garamendi's* resurrection of *Zschernig*.

The Solicitor General extends *Garamendi's* holding well beyond the case itself, ignoring that the preemption found in *Garamendi* was based on "a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." *Medellín v. Texas*, 552 U.S. 491, 531 (2008); *see* Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 331-32 (2009). Indeed, fewer than two weeks ago, in *Chamber of Commerce of the U.S. v. Whiting*, No. 09-115, slip op. at 19 (U.S. May 26, 2011) (amicus brief submitted by Solicitor General in Support of Chamber of Commerce), this Court further clarified that *Garamendi* only concerned state actions that directly interfered with an "international

program" negotiated by the President to address the issue at hand.

But it is not only the Solicitor General who distorts *Garamendi* beyond this Court's limited holding. Following the Ninth Circuit's decision in *Von Saher*, either this case or *Garamendi* has been cited by litigants in no fewer than six petitions for writ of certiorari to this Court on issues of foreign affairs preemption, four of which dealt with Holocaust issues. *See Deuley v. Dyncorp Int'l, Inc.*, 8 A.3d 1156 (Del. 2010); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2010); *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010) and *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010); *In re Assicurazioni Generali, S.p.A.*, 592 F.3d 113 (2d Cir. 2010); *Grosz v. Museum of Modern Art*, 403 Fed. Appx. 575 (2d Cir. 2010). These petitions plainly demonstrate that it is not only the Solicitor General who thinks that *Garamendi* stands for something it does not.

We submit that the Court should revisit *Zschernig* and *Garamendi*, and delineate the scope of the field preemption/dormant foreign affairs doctrine to avoid further confusion among litigants, and more importantly, to prevent the Federal Government from using these decisions to appropriate powers that have traditionally been left to the states. *See* J. Kreder, *State Law Holocaust-Era Art Claims and Federal Executive Power*, 105 Nw. U. L. Rev. Colloquy 315 (2011), http://colloquy.law.northwestern.edu/main/2011/05/state-law-holocaust-era-art-claims-and-federal-executive-power.html.

Garamendi has been cited as "an excellent example of 'doctrine creep.'" B. Denning & M. Ramsey, American

Ins. Assoc. v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 Wm. & Mary L. Rev. 825, 869 (2004). Further, commentators are concerned that it has permitted confusion between, and amalgamation of, the field preemption and dormant foreign affairs doctrines. Denning & Ramsey at 877-78; M. Schaefer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 Seton Hall L. Rev. 201, 288-89 (2001). The process for examining this new combined doctrine is relegated to a balancing test set forth in *Garamendi's* footnote 11, which invites speculation by litigants who exploit language such as "*if* a state were," "field preemption *might* be," and "it *might* make good sense." Denny & Ramsey at 925-26 (emphasis added). Greater clarity is required. *Id.* at 926; Schaefer at 207. *See* C. Pytynia, Note, *Forgive Me, Founding Fathers For I Have Sinned: A Reconciliation Of Foreign Affairs Preemption After* Medellín v. Texas, 43 V and. J. Transnat'l L. 1413, 1429 (2010).

Critically, *Garamendi* states that field preemption should not apply if the state is acting in an area of "traditional state responsibility." *Garamendi*, 539 US at 419 n.11. While statutes of limitations for claims for stolen property are undoubtedly a traditional state responsibility, the Ninth Circuit looked beyond § 354.3, the statute at issue here and its legislative history to ascribe an unstated intent to the California legislature. Using *Garamendi* in this fashion -- to rob the states of their traditional responsibilities by divining a legislative intent nowhere evidenced in the legislative record -- demonstrates the problems caused by some courts' interpretations of this footnote in *Garamendi*.

The Solicitor General repeats many of the Respondents' arguments already refuted by Petitioner. We respectfully refer the Court to Petitioner's prior responses thereto. *Compare* U.S. Br. at 10-11 *with* Pet. at 16-20 and Reply at 11; and U.S. Br. at 12 *with* Pet. at 21-23 and Reply at 5-6.

The Solicitor General also attempts to argue that § 354.3 is preempted by actual conflict. But *Garamendi* concerned state action that "directly interfered with the operation of the federal program." *Whiting* at 19. As shown below, the Solicitor General's attempt to create a "federal program," and then claim that § 354.3 is in conflict with it, flies in the face of over 40 years of Holocaust looted art litigation in this country, as well as authoritative pronouncements by the State Department's Special Envoy for Holocaust Issues and the head of the U.S. Delegation to the Prague Holocaust Era Assets Conference.

The Solicitor General admits that the U.S. has not entered into an executive agreement with any foreign government to resolve contemporary claims for Nazi-looted art. Nevertheless, pre-judging the facts of the case, he has determined that the artworks at issue here were already the subject of a *bona fide* restitution proceeding, and concludes that the U.S. has "a continuing interest in that finality when appropriate actions have been taken by a foreign government concerning the internal restitution of art that was externally restituted" (U.S. Br. at 17) at the end of WWII. Thus, the Solicitor General attempts to set up a conflict with the decades-defunct external restitution policy. *See* Reply at 7-9.

This Court has made clear, however, that the preemptive effect of the executive policy at issue in

Garamendi -- favoring the ICHEIC over California's state statute -- was based on "a narrow set of circumstances," i.e., "the making of executive agreements to settle litigation claims between American citizens and foreign governments or foreign nationals." *Medellín*, 552 U.S. at 531. The post-War external restitution policy was not an effort to settle litigation claims of anyone, and certainly not of American citizens. Whatever internal restitution occurred, or did not occur, obviously was not an act of the U.S. Executive to settle claims. If the U.S. now decides that it has a "continuing interest" in the finality of post-War restitution, this is not an exercise of the "claims-settlement" powers that can preempt state law. *Id.* at 531-32. Indeed, under *Medellín* it seems unlikely that the external restitution policy, even when in force at the War's end, would have preempted the states.

In any event, the Solicitor General mischaracterizes what "internal restitution" actually occurred in the Netherlands. In February 2006, after the Dutch Restitutions Committee comprehensively investigated the Goudstikker case, the State Secretary for the Ministry of Education, Culture and Science decided that the Dutch Government should restitute to Ms. von Saher 200 paintings looted by Göring, and they were returned to Ms. von Saher in February 2007.

The 2006 decision vindicated the actions of Jacques Goudstikker's widow, Désí, in the 1950's, accepting the Restitutions Committee's findings that, among other things: (a) contrary to the previous State Secretary's 1998 decision, Désí's claim to the Göring works had not been settled in 1952 (ER 47-48, 50); (b) Désí had refused the Dutch Government's request that she waive the Göring

claims (ER 47-48); and (c) neither her failure to bring a restitution proceeding for the Göring works in the 1950's nor the 1999 decision of the Court of Appeals of the Hague precluded restitution of these works in 2006 (ER 48-51, 62).[1]

The Committee noted that Dési had complained about the unfair treatment she received at the hands of the Dutch bureaucracy (ER 49) and that "the authorities responsible for the restorations of rights or their agents *wrongfully* created the impression that Goudstikker's loss of possession of the trading stock did not occur involuntarily."[2] ER 50 (emphasis added). A Dutch Government committee that made a more general investigation into post-War restitution procedures came

---

1. The Solicitor General is also wrong to suggest that claims to the Cranachs were settled by the 1999 decision, which rejected Ms. von Saher's claim solely on narrow jurisdictional and procedural grounds. It never addressed claims for damages for paintings previously sold by the Dutch Government, and its decision not to exercise its *ex officio* authority "as the legal successor to the [post-War] Council for the Restoration of Rights" (ER 50) was not a decision on the merits, but simply an acknowledgement that, because Dési had decided against bringing a restitution proceeding before the Council in the 1950's, Ms. von Saher could not bring the same proceeding before the successor tribunal in the 1990's. (*Id.*)

2 While acknowledging that Goudstikker's property was expropriated through a forced sale to the Nazis, the Solicitor General nevertheless gratuitously cites the sums paid and even converts them into contemporary dollars to make them appear larger. We assume that the Solicitor General does not mean to imply that Reichsmarschall Göring paid full value for Jewish-owned property or that Goudstikker's heirs should have been satisfied with whatever the Nazis were willing to pay.

to a similar conclusion: "Based on our examination of the documents relating to a great number of post-war claims we must describe the way in which the Netherlands Art Property Foundation generally dealt with the problems of restitution as legalistic, bureaucratic, cold and often even callous." *Recommendations for the Restitution of Works of Art*, Ekkart Committee (Apr. 2001), http://www.herkomstgezocht.nl/download/aanbevelingen2en.doc at 7-8. In light of the Dutch Government's own conclusion that its post-War restitution proceedings were not conducted in good faith, there is no basis for the Solicitor General's contrary position.

What the Solicitor General ignores is the fact that the Göring works in the hands of the Dutch Government were finally restituted to Ms. von Saher, and if the Cranachs had been in the Netherlands, they would have been returned as well. It is this "finality" that he should respect. Indeed, the Dutch Government has expressly confirmed that this lawsuit is of no concern to it: "I confirm to you that the State of the Netherlands is not involved in this dispute. The State is of the opinion that this concerns a dispute between two private parties." *See* Letter sent on behalf of the Dutch Minister for Education, Culture and Science to Ms. von Saher's Dutch counsel.[3]

Moreover, it appears that the Federal Government's left hand does not know what its right hand is doing. For over ten years the U.S. Attorney for the Southern District of New York pursued the civil forfeiture of "Portrait

3. The letter was submitted to the District Court as part of Ms. von Saher's Opp'n to the Mot. to Dismiss, attached as Ex. 1 to the Decl. of Robert Willem Polak.

of Wally," a Nazi-looted painting that was externally restituted to Austria, but was never restituted by Austria to the rightful owner. *See United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 247 (S.D.N.Y. 2009). The *Wally* case makes clear that the U.S. does *not* have a substantial interest in respecting the outcome of another nation's internal restitution when, as in the Goudstikker case, it does not result in the return of the looted art to its rightful owner.

It cannot be disputed that it is the policy of the U.S. that artworks looted by the Nazis should be identified and returned to their pre-War owners. *See Proceedings of the Washington Conference on Holocaust-Era Assets* (J.D. Bindenagel ed. 1999), *available at* http://www.state.gov/www/regions/eur/holocaust/heac.html; Stuart E. Eizenstat, *Imperfect Justice* 192-99 (2003); J. Christian Kennedy, Special Envoy for Holocaust Issues, *The Role of the United States Government in Art Restitution*, Conference in Potsdam Germany (Apr. 23, 2007), http://germany.usembassy.gov/kennedy_speech.html (ER 12). Yet, the Solicitor General implies that litigation to retrieve looted art is somehow outside this policy, contending that neither the Washington Conference Principles on Nazi-Confiscated Art nor the Terezin Declaration takes an explicit position in favor of or against the litigation of claims for Nazi-confiscated art, but rather only encourages alternative dispute resolution.

But, as the State Department has expressly acknowledged, if and when voluntary alternative dispute resolution fails, since there is "no specific role for the federal government in the art restitution process," the claimant "has the option of turning to the courts." *See*

Kennedy at ER 13. Thus, the Solicitor General has grossly misstated the State Department's own interpretation of the Washington Principles and the Terezin Declaration.[4] The Solicitor General also conveniently ignores that fact that the very same person who argued that the California statute at issue in *Garamendi* conflicted with the Federal Government's resolution of Holocaust insurance issues, Ambassador Stuart Eizenstat, has stated that with respect to claims for the recovery of Nazi-looted art, he is "concerned by the tendency of holders of disputed art to seek refuge in statutes of limitation and laches defenses in order to block otherwise meritorious claims." *See* Stuart E. Eizenstat, *Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference*, Prague Conference on Holocaust Era Assets, Czech Republic (June 28, 2009), http://www.state.gov/p/eur/rls/rm/2009/126158.htm.

The Solicitor General appears to have forgotten that the U.S. convened the Washington Conference because it was well-aware that there were enormous problems with post-War internal restitution procedures and, more specifically, because it knew they had not been undertaken in good faith. In the "Opening Ceremony Remarks," the Chairman of the U.S. Holocaust Memorial Council stated:

---

4. Indeed, the Solicitor General's brief is rife with misstatements of the facts, the Petitioner's allegations, and statements of U.S. policy. For example, the Solicitor General states, "The Washington Principles generally encourage the return to its pre-war owner of art that was confiscated by the Nazis and not subsequently restituted *or available to be restituted through bona fide procedures*." U.S. Br. at 18 (emphasis added). The emphasized phrase, for which the Solicitor General offers no citation, appears nowhere in the Washington Principles.

> What really shocked the conscience of the world was the discovery that even after the war, some countries tried to gain materially from this cataclysm by refusing to return to the rightful owners what was justly theirs. The refusal to respond to these rightful claims was a great injustice, a moral wrong which can not be ignored. . . . We are here to make sure that these wrongs are corrected in a just and proper manner.

Proceedings of the Washington Conference 3.

The Solicitor General also concludes, without hearing Petitioner's arguments on the issue, and without the relevant facts before it, that this case will eventually be lost by Petitioner on the basis of the act of state doctrine or considerations of international comity. Though Petitioner remains confident that it will prevail on these issues, they have nothing whatsoever to do with that fact that possessors of Nazi-looted art are using state statutes of limitations to preclude Holocaust victims and their heirs from reclaiming Nazi-looted art. The problem is that the Ninth Circuit and the Solicitor General erroneously believe that the states whose statutes are being used in that way have no right to change them.

This is particularly troubling in light of the decision upon rehearing in *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901 (9th Cir. 2010). Having reversed its conclusion that there was a direct conflict with federal policy, the Ninth Circuit then applied the same test for field preemption from *Garamendi* that it did in *Von Saher*, and found that the California statute extending the statute

of limitations for the heirs of victims of the Armenian Genocide to recover on insurance claims concerned "garden variety property claims" and consequently is not preempted by the field preemption/dormant foreign affairs doctrine. *Movsesian*, 629 F.3d at 908. This grossly disparate outcome alone cries out for a reexamination and clarification of *Garamendi*. *See* Pet'r's First Supp. Br.

Finally, the Solicitor General says that the Court should not grant this petition because Petitioner can now proceed under California's general statute of limitations, and when Respondents argue the unconstitutionality of that statute, and after more years of litigation, Petitioner can again seek this Court's review should she not prevail. Among other things, this short-sighted argument ignores the notion that a unanimously passed law in California should not be lightly cast away without a definitive decision by this Court as to its constitutionality. Indeed, contrary to the Solicitor General's view, this is not just about one family's effort to reclaim its legacy. Holocaust victims residing in other states are entitled to a prompt review of this case to instruct them with respect to their own efforts to have their states pass similar legislation. *See* Br. of Amicus Curiae Commission for Art Recovery.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE M. KAYE
Counsel of Record
DARLENE FAIRMAN
HOWARD N. SPIEGLER
FRANK K. LORD IV
HERRICK, FEINSTEIN LLP
2 Park Avenue
New York, NY 10016
(212) 592-1400
lkaye@herrick.com

E. RANDOL SCHOENBERG
DONALD S. BURRIS
LAURA G. BRYS
BURRIS, SCHOENBERG
& WALDEN, LLP
12121 Wilshire Boulevard
Suite 800
Los Angeles, CA 90025-1168
(310) 442-5559

Attorneys for Petitioner Marei von Saher